Supreme Court, U.S.
FILED
JAN 24 1985
ALEXANDER L. STEVAS
CLERK

84-1205

No.

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 3-261,

Petitioner,

v.

IRENE KUHN, Personal Representative of the Estate of Wolfgang D. Kuhn,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether this Court's decision in DelCostello v. Teamsters, 462 US 151, 103 S Ct 281, 76 LEd2d 476 (1983) (which limits to six months the time within which claims of unfair representation may be brought against labor organizations) governs claims which were pending in court on the date DelCostello was decided.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals in this matter is unreported, and was rendered without oral argument. In its opinion and ensuing judgment, the Court of Appeals reversed the judgment of the United States District Court of the District of Oregon, which had dismissed Kuhn's complaint against the IWA as untimely filed. The opinion of the Ninth Circuit Court of Appeals is attached to this petition as Appendix A. The unreported order of the United States District Court for the District of Oregon is attached as Appendix B. The order of the Ninth Circuit denying rehearing is attached as Appendix C.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was dated and filed on July 26, 1984. A timely petition for rehearing and suggestion for rehearing in banc was filed by petitioner IWA. The Court of Appeals denied rehearing on October 26, 1984. This petition is timely filed within 90 days of that date pursuant 28 USC 2101(c), as contemplated by Supreme Court Rule 20.4.

STATUTE INVOLVED

The only statute involved in this case is 29 USC §185(a), which provides in pertinent part:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States

> having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

1. Statement of the Facts

The case was dismissed on the pleadings by the District Court. Thus, all facts are taken from plaintiff's complaint (CR 1, ER 1).

Wolfgang Kuhn was employed by Weyerhaeuser Corporation, in North Bend, Oregon as a hyster driver. On May 4, 1981, he was terminated for damaging company property, spilling a load from his hyster, and endangering a coemployee. These problems arose during an incident when Kuhn allegedly ran into a support post in the warehouse with his lift truck.

Kuhn disputed his discharge, and

IWA Local 3-261 filed a grievance on his behalf. Although the contract between Weyerhaeuser Company and the IWA has a "just cause" discharge clause, the grievance mechanism within the contract does not contain a "final and binding arbitration" clause. The contract itself is not before the Court; however, from allegations in Kuhn's district court complaint it can be inferred that if a dispute exists between the employer and the union at the last (fourth) stage of the grievance procedure, resolution is left to a strike by the union, rather than to arbitration.

The grievance was carried to step IV of the contract. It was at that level, on May 19, 1981, that Weyerhaeuser Company offered to settle the Kuhn grievance. Under

the terms of Weyerhaeuser Company's offer, Kuhn would be reinstated at Weyerhaeuser, but as a utility worker, with a wage reduction of $.70 per hour. Weyerhaeuser's offer was open until June 15, 1981.

Kuhn claimed to have been advised by the union that a special meeting of the union membership would be called and a "strike vote" taken. Kuhn alleged this never occurred, and instead the matter was was discussed at a "regular" union meeting, which took place on June 14, 1981, the day before Weyerhaeuser's offer expired. Kuhn alleged the union falsely stated at that meeting that Kuhn had no support among the union members. Thus, no strike vote was taken, and Kuhn was "forced" to accept Weyerhaeuser's

offer of reduced employment.

Twenty-three months later, on May 4, 1983, Kuhn filed a complaint in the United States District Court of the District of Oregon naming as defendants Weyerhaeuser Company and the IWA, Local 3-261. Kuhn conterded, among other things, that Weyerhaeuser breached its contract in discharging him for other than "just cause", and that the IWA failed to fairly represent him in his grievance arising out of that discharge.

On IWA's motion, the District Court dismissed Kuhn's action as time barred, specifically holding that DelCostello, 462 US 151, 103 S Ct 281, 76 LEd2d 476 (1983), decided June 8, 1983, should apply to Kuhn's claim (Opinion and Order 3).

As the court found IWA's argument equally applicable to plaintiff's claims against Weyerhaeuser, the court on its own motion granted judgment on the pleadings to Weyerhauser.

Kuhn appealed to the Ninth Circuit Court of Appeals. [1]

The Ninth Circuit reversed the District Court, refusing to apply DelCostello retroactively. IWA petitioned for rehearing and the court denied the petition on October 26, 1984.

2. Procedural History: Basis of Federal Jurisdiction.

The procedural history of the

[1] Kuhn voluntarily dismissed his claim against Weyerhaeuser, conceding it was time barred under United Parcel Service v. Mitchell, 451 US 56, 67 LEd2d 732 (1981). Kuhn died in June, 1984, and his widow was substituted as plaintiff.

claim through the District Court and Court of Appeals is as set forth above. Jurisdiction in the District Court is based upon 29 USC §185. Jurisdiction of the Court of Appeals was conferred pursuant to 28 USC §1291.

REASONS FOR ALLOWANCE OF WRIT

Rule 17.1(a) permits granting a review on writ of certiorari when a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter. In this case, the Ninth Circuit Court of Appeals stands alone in its refusal to apply this Court's decision in DelCostello v. Teamsters, supra, to all cases arising out of claims of unfair representation by labor organizations.

In Edwards v. Teamsters, Local No. 36, 719 F2d 1036 (9th Cir. 1983), cert. den. 104 S Ct 1589 (1984), the Ninth Circuit Court of Appeals first decided the impact of DelCostello on cases filed prior to the decision.

In Edwards, the Court applied the test laid down by this Court in Chevron Oil Company v. Huson, 404 US 97, 92 S Ct 349, 30 LEd2d 296 (1971) regarding retroactive application of a statute of limitations, and held, under Chevron Oil Company, supra, that DelCostello could not be applied retroactively.

In McNaughton v. Dillingham Corporation, 722 F2d 1459 (9th Cir. 1984), another panel of the Ninth Circuit decided that under Chevron Oil Company v. Huson, supra, DelCostello v. Teamsters could not be

applied retroactively in this Circuit.

In Barina v. Gulf Trading & Transportation Corp., 726 F2d 560 (9th Cir. 1984), a third panel of the Ninth Circuit Court of Appeals decided that neither United Parcel Service Inc. v. Mitchell, 451 US 56, 101 S Ct 1559, 67 LEd2d 732 (1981) nor DelCostello will be applied retroactively. The panel deciding Barina noted the Ninth Circuit's variance with every other Circuit across the country which had decided the issue. 726 F2d 563 at nt. 5.

Essentially, the Ninth Circuit said it was unimpressed with the rule of law in all other Circuits, and as stated by this Court; the rule in the Ninth Circuit apparently will be followed regardless of its correctness. As a matter of the

exercise of the Court's power of supervision, and to maintain consistency within the Circuits on this important issue of federal law, certiorari should be granted. See United States v. Morton, 467 US ---, 81 LEd2d 680, 104 S Ct --(1984).

ARGUMENT

As indicated, all other Circuit Courts of Appeal deciding the issue have decided contrary to the Ninth Circuit's decision in Edwards, McNaughton, Barina, and the case at bar. That is, all Circuit Courts of Appeal have applied this Court's decision in DelCostello retroactively.

First Circuit: Graves v. Smith's Transportation Corp., 736 F2d 819 (1st Cir. 1984). The First Circuit gave weight to the precedent of other

Circuits so deciding, and applied the Chevron Oil Company v. Huson standard in holding DelCostello retroactive.

Second Circuit: Welyczko v. U.S. Air, Inc., 733 F2d 239 (2nd Cir. 1984). The Second Circuit noted in this decision that the Ninth Circuit stands alone in its refusal to apply DelCostello retroactively.

Third Circuit: Sisco v. Consolidated Rail Corp., 732 F2d 1188 (3rd Cir. 1984), applied DelCostello retroactively to a claim under the National Labor Railway Act (45 USC 153 et. seq.). Scott v. Local 863, International Brotherhood of Teamsters, 725 F2d 226 (3rd Cir. 1984), citing to Chevron Oil Company v. Huson, supra.

Fourth Circuit: Murray v. Branch Motor Express Company, 723 F2d 1147 (4th Cir. 1983). This specifically holds DelCostello to be retroactive.

Fifth Circuit: Gray v. Amalgamated Meat Cutters Local 540, 736 F2d 1055 (5th Cir. 1984). Edwards v. Sea-Land Services, Inc. 720 F2d 857 (5th Cir. 1983).

Sixth Circuit: Curtis v. International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, Local 299, 716 F2d 360 (6th Cir. 1983). Dicta as to retroactivity.

Seventh Circuit: Ernst v. Indiana Bell Telephone, 717 F2d 1036 (7th Cir. 1983), cert. den. 104 S Ct 707 (1984). Applied DelCostello retroactively, without discussion.

Eighth Circuit: Rodman v. Hensley, 740 F2d 665 (8th Cir. 1984). Lincoln v. Dist. 9, IAM, 723 F2d 627 (8th Cir. 1983).

Tenth Circuit: Metz v. Tootsie Roll Industries, Inc., 715 F2d 299 (10th Cir. 1983), cert. den. 104 S Ct 976 (1984).

Eleventh Circuit: Rogers v. Lockheed-Georgia Company, 720 F2d 1248 (11th Cir. 1983), reh. den. (1984). Applies DelCostello retroactively, discussing Chevron Oil Company v. Huson.

In virtually all these cases, the Courts of Appeal were cognizant of the following:

(1) As a general rule, Federal courts should apply the law in effect at the time of their decision. Gulf Offshore Company v. Mobil Oil Corp.,

453 US 473, 101 S Ct 2870, 69 LEd2d 784 (1981).

(2) Departure from that general rule will occur only if the compelling standards of Chevron Oil v. Huson, supra, are met.

(3) The compelling standards in Chevron Oil v. Huson, supra, could not be met in these cases.

(4) This Court applied its decision in DelCostello retroactively, i.e., following the general rule, to the claimants there.

It is clear from the Ninth Circuit's decisions in McNaughton, Edwards, Barina and the case at bar, that that court is concerned that application of DelCostello would be "unfair" if applied to litigants relying on longer periods of limitations. While in some instances

that might be true, the test in Chevron Oil v. Huson, is not unfairness, but whether the new decision constitutes a "sharp break" from past precedent. This Court has identified what it considers to be a "sharp break" from past precedent:

> "***Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, see, e.g., Desist v. United States, 394 US 244, 22 L Ed2d 248, 89 S Ct 1030 (1969); Williams v. United States, 401 US 646, 28 L Ed2d 388, 91 S Ct 1148 (1971), or disapproves a practice this Court arguably has sanctioned in prior cases, see e.g., Goss v. Mayden, 413 US, at 673, 37 L Ed2d 873, 93 S Ct 2926 (plurality opinion); Adams v. Illinois" 405 US at 283, 31 L Ed2d 202, 92 S Ct 916; Johnson v. New Jersey, 384 US, at 731, 16 L Ed2d 881, 86 S Ct 9772, 8 Ohio Misc 324, 36 Ohio Ops 2d 439, or overturns a longstanding and widespread practice to which this Court has not spoken, but with a near-unanimous body of lower court authority has expressly approved. ***." 73 L Ed2d at 215, citations omitted. United States v. Johnson, 457 US 537, 73 LEd2d 202, 102 S Ct 2579 (1982).

As indicated to the Ninth Circuit in petitioner's petition for rehearing, none of those examples apply here. All other Circuit Courts have understood that DelCostello did not overrule any prior precedent or make a "clear break" with prior decisions. Thus, there could be no justifiable reliance by any plaintiff upon decisions in this or other Circuits which would prohibit application of the general rule of retroactive application.

While this case is facially simple, it is of utmost importance to labor organizations throughout the Ninth Circuit. As the Ninth Circuit stands alone now, labor organizations are subjected to liability for actions caused by employers, long after the employers

themselves can be required to respond for their improper actions. In this Circuit, and this Circuit alone, an employer is permitted the benefit of the rule in DelCostello, while a labor organization, whose liability is derivative at best, is potentially liable long afer an employer's liability has been extinguished. Given the underlying reasons for application of the six month limitation imposed by DelCostello (hybrid nature of the action, concurrent liability of union and employer, rapid disposition of labor disputes), it appears without any base in logic to permit differing lengths of liability to continue. This case may be appropriate for summary reversal.

CONCLUSION

For the reasons stated in this writ, the petition should be granted.

Respectfully submitted,

ROBERT K. UDZIELA
POZZI, WILSON, ATCHISON,
O'LEARY & CONBOY

Counsel for Petitioner

APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IRENE KUHN, Personal Representative of the estate of Wolfgang D. Kuhn,	)	
Plaintiff-Appellant,	)	No. 84-3514
	)	D.C. No. CV
vs.	)	83-6172
	)	MEMORANDUM
INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 3-3261,	)	
Defendant-Appellee.	)	

Submitted - May 24, 1984*

Decided - July 26, 1984

Appeal from the United States
District Court
for the District of Oregon
Robert C. Belloni, District Judge,
Presiding

Before: BROWNING, Chief Judge,
WALLACE and POOLE,
Circuit Judges

*The panel is unanimously of the opinion that oral argument is not required in this case. Fed R. Civ. P.34(a)

Kuhn appeals from the district court's grant of judgment on the pleadings to the International Woodworkers of America, Local 3, 261, on his breach of duty of fair representation claim. He contends that the district court erred by holding that his action was time-barred by the Supreme Court's decision in DelCostello v. Teamsters, -- U.S. --, 103 S. Ct. 2281 (1983), which the district judge concluded, should be applied retroactively. We reverse. DelCostello does not apply retroactively to claims for breach of duty of fair representation. McNaughton v. Dillingham Corp., 722 F.2d 1459 (9th Cir. 1984). The appropriate statute of limitations is Oregon's two-year statute for professional malpractice actions. Id., Under Or. Rev. Stat. § 12.110 (1983), Kuhn's action was timely filed.

REVERSED. **

** The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

A/O, USC 8-8-84--T1344--600

APPENDIX B

US District Court
District of Oregon
FILED AND ENTERED

November 16, 1983
/s/ DAN MARSH

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

WOLFGANG D. KUHN, Plaintiff, v. WEYERHAEUSER COMPANY, a Washington corporation; INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 3-261, Defendants.	)	Civil No. 83-6172-C JUDGMENT

This action is dismissed.

Dated: November 16, 1983.

Robert M. Christ, Clerk

By /s/ Dan Marsh
Deputy

US District Court
District of Oregon
FILED AND ENTERED

November 16, 1983
/s/ DAN MARSH

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

WOLFGANG D. KUHN, Plaintiff, v. WEYERHAEUSER COMPANY, a Washington corporation; INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL 3-261, Defendants.	)	Civil No. 83-6172-C ORDER

Plaintiff brings this action pursuant to Section 301 of the Labor-Management Act, 29 U.S.C. § 185 et seq.

On May 4, 1981, plaintiff was discharged by defendant Weyerhaeuser Company after a hyster accident which allegedly endangered another employee's

life. Plaintiff filed a grievance with his union, defendant International Woodworkers of America, and the matter proceeded to arbitration under the applicable collective bargaining agreement. At the conclusion of the grievance proceeding, Weyerhauser offered plaintiff another position at the company, pending plaintiff's acceptance of the offer by June 15, 1981. Although plaintiff did have hopes the union would call a strike vote, the strike did not occur and plaitniff did accept the offer. He filed the present action on May 4, 1983.

The Union moved for judgment on the pleadings, on the ground that plaintiff's action is time-barred by DelCostello v. International Brotherhood of Teamsters, --- US ---, 103 S

Ct 2281 (1983). In that case, the Supreme Court held that the statute of limitations applicable to Section 301 actions is not the analogous state statute, but Section 10(b) of the National Labor Relations Act, 29 USC § 160(b). Noting that labor grievance procedures are usually governed by the short limitations period applicable to arbitration awards (e.g., ninety days in DelCostello, twenty days in ORS 33.310), the Supreme Court balanced the interests at stake and found the six-months period in Section 10(b) best suited to the kind of actions brought under Section 301. It commented that the arbitration statutes of limitations seemed too short, yet the other possibly applicable period -- tort, contract, and the like -- seemed too long. The

Court did not state whether DelCostello should be applied retroactively.

The union has moved for judgment on the pleadings based on DelCostello. Plaintiff filed his action a month before the Supreme Court decided DelCostello, and he contends DelCostello should not be applied retroactively. He proposes as the applicable period various limitations periods of two or six years, dpending on characterization of his claims as tort, action based on a statute, or contract (see ORS 12.110, 12.080(2), 12.080(1), respectively). Plaintiff has overlooked, however, the arbitration limitations period of twenty days, ORS 33.310. That statute provides that an action based on an arbitration award must be filed within twenty days

of final judgment, subject to certain exceptions of fraud, partiality, or other misconduct and error. While plaintiff charges the union with laxness and failure to call the promised strike vote, he does not frame his allegations to place his action within one of the exceptions of ORS 33.310. The pleadings are also vague on the finalness of the Weyerhauser offer. Plaintiff has not provided a copy of the collective bargaining agreement, "since defendants already have a copy," and so I cannot determined if "Step IV of the grievance procedure" constituted a final arbitration of the dispute. If it did not, plaintiff's acceptance of the compromise offer might constitute a final arbitration under ORS 33.310. While the pleadings do not clearly show that plaintiff's action is time-barred by

ORS 33.310, they do raise a significant question. The most likely choice is not, as plaintiff contends, between the six months and twenty days.

I find, howver, that DelCostello should be applied retroactively. The Supreme Court specifically weighed the policy interests at stake in labor-dispute actions, and found that the short statutes of limitations usually applicable by analogy to state law did not suit the purpose of the Labor-Management Act. Neither did the longer statutory periods applicable from state actions in malpractice, other tort, or contract. Federal law provided a six-months period in an analogous labor action, and the Supreme Court adopted that compromise period.

This case is similar to DelCostello in that it, too, involves an extremely

short limitation period of twenty days and a labor grievance actionable under both federal and state law. Plaintiff accepted Weyerhauser's compromise offer nearly two years before he filed his action. The policies behind the Labor-Management Relations Act did not contemplate that labor grievances be pending for years, yet do not provide that an employee's rights be cut off in twenty days. As in DelCostello, the six-months period in Section 10(b) is a compromise limitations period that best suits the purposes of the Act. I find, therefore, that DelCostello does apply to the present case, and that plaintiff's claims are therefore time-barred.

Defendant Union's motion for judgment on the pleadings is GRANTED. Since defendant's arguments are equally

applicable to plaintiff's claim against Weyerhauser, I grant judgment on the pleadings to Weyerhauser on the court's own motion. This action is dismissed in its entirety.

Dated this 15th day of November, 1983.

/s/ Robert C. Belloni
UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED
October 26, 1984
PHILLIP B. WINBERRY
Clerk, US COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRENE KUHN, Personal Representative of the Estate of Wolfgang D. Kuhn,	)	No. 84-3514
Plaintiff-Appellant	)	D.C.No. CV 83-6172
v.	)	ORDER
INTERNATIONAL WOOD-WORKERS OF AMERICA, LOCAL 3-3261,	)	
Defendant-Appellee.	)	

Appeal from the United States
District Court of Oregon

BEFORE: BROWNING, Chief Judge, and
WALLACE and POOLE, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion of rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

(8)

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No. 84-1205

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

INTERNATIONAL WOODWOORKERS OF AMERICA, LOCAL 3-261,

Petitioner,

v.

IRENE KUHN, Personal Representative of the Estate of Wolfgang D. Kuhn,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether this Court's decision in DelCostello v. Teamsters, 462 US 151, 103 S Ct 281, 76 LEd2d 476 (1983) (which limits to six months the time within which claims of breach of the duty of fair representation may be brought against labor organizations) applies retroactively to claims pending in the United States District Court for the District of Oregon prior to the date on which DelCostello was decided.

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Price v. Southern Pacific Transportation Co., 586 F2d 750, 753, (9th Cir. 1978).. 9, 13

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STATEMENT OF THE CASE

Because this action was dismissed by judgment on the pleadings before any evidence was presented, the facts are taken from plaintiff's Complaint. Wolfgang Kuhn was employed by Weyerhaeuser Corporation in North Bend, Oregon, on August 6, 1965, and was classified as a hyster driver on August 30, 1965. He was continuously employed in that classification until May 4, 1981, when he was discharged. (CR 1, ER 1). The pretext for the discharge was Mr. Kuhn's alleged history of safety violations, and that he had, while driving his hyster, struck and damaged a support post, thereby spilling part of a load of plywood and endangering a co-worker's

life. In fact, Mr. Kuhn had not hit the support beam and had not endangered any co-workers.

The real reason for Mr. Kuhn's discharge was that he was personally disliked by his supervisor and therefore discriminated against and singled out for unfair criticism. The charges concerning the striking of the support beam and the endangering of the co-worker were based upon statements made to the supervisor by one Ernie Larson, who the union, IWA Local 3-261, permitted to represent Mr. Kuhn in the ensuing grievance proceedings.

IWA and Weyerhaeuser had entered into a collective bargaining agreement which provided, in part, that employees would not be suspended or

discharged except for "just cause." The discharge of Mr. Kuhn was without "just cause," and Mr. Kuhn protested his discharge to the union and a grievance was filed. IWA'S representation of Mr. Kuhn throughout the grievance process was arbitrary, perfunctory and in bad faith, in that it failed to investigate Mr. Kuhn's claims prior to meetings of the standing committees, failed to call any witnesses on Mr. Kuhn's behalf, although such witnesses were available, and permitted Mr. Kuhn's accussor to represent him.

On May 19, 1981, Weyerhaeuser offered Mr. Kuhn a position as a utility worker, the lowest classification in the plant, at a $.70 per hour wage reduction. The offer was

open until June 15, 1981, at which time Weyerhaeuser would withdraw it and finally terminate Mr. Kuhn. The executive committee of the IWA local advised Mr. Kuhn that it would call a special meeting for the purpose of conducting a strike vote. However, at the regular union meeting on June 14, 1981, a union representative made a false public announcement that Mr. Kuhn had no support among his co-workers. Mr. Kuhn was therefore forced to choose between accepting the utility worker position or being finally terminated before a strike vote could be called, and he was operating under the mistaken belief that his cause had no support.

As a result of the IWA'S breach of its duty of fair representation,

Mr. Kuhn was forced to accept the utility worker position. That position required Mr. Kuhn to handle industrial chemicals to which he was allergic and which resulted in severe dermatitis and other allergic reactions, which prevented Mr. Kuhn from working a great deal of the time. Despite this, the union refused to negotiate further with Weyerhaeuser to find Mr. Kuhn work which he was able to perform.

As a result of the wrongful discharge by Weyerhaeuser and the IWA's breach of its duty of fair representation, Mr. Kuhn suffered illness, medical expenses, lost wages and lost benefits.

Mr. Kuhn filed a complaint in the United States District Court for the

District of Oregon on May 4, 1983, naming as defendants Weyerhaeuser Corporation and IWA, Local 3-261. The complaint alleged a cause of action against Weyerhaeuser for unjust dismissal, and against the union for breach of its duty of fair representation. After both defendants had filed answers, the union moved to dismiss the action as time barred. The District Court concluded that this court's decision in DelCostello v. Teamsters, 462 US 151, 103 S Ct 281, 76 LEd2d 476 (1983), decided June 8, 1983, should apply retroactively to bar Mr. Kuhn's claim. On its own motion, the District Court granted judgment on the pleadings to defendant Weyerhaeuser as well.

Mr. Kuhn appealed to the Ninth

Circuit Court of Appeals on December 13, 1983. He subsequently voluntarily dismissed his claim against Weyerhaeuser, conceding it was time barred under United Parcel Service v. Mitchell, 451 US 56, 67 LEd2d 732 (1981), which had been decided before the original complaint was filed.

In an unpublished opinion, the Ninth Circuit reversed the District Court, holding that DelCostello did not apply retroactively to bar this claim. The union petitioned for rehearing and the court denied the petition on October 26, 1984.

ARGUMENT

The Petition for Writ of Certiorari should be denied because the Ninth Circuit correctly determined that DelCostello should not be given

retroactive effect to shorten the statute of limitations in existence in the Ninth Circuit at the time this action was filed, and because this issue is not of substantial enough importance to merit the attention of the Court.

The Ninth Circuit first confronted the issue of whether DelCostello should be retroactively applied in Edwards v. Teamsters Local Union No. 36, 719 F2d 1036, 1038 (9th Cir. 1983). In deciding whether to apply DelCostello retroactively, the Edwards court reviewed the factors to be considered:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied. .

> ., or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . Second, it has been stressed that 'we must. . . weigh the merits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.'. . . Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'"

719 F2d at 1040, quoting, Chevron Oil Co. v. Houson, 404 US 97, 106-07 (1971).

The Edwards court concluded that the first criterion was met because the DelCostello ruling had not been "clearly foreshadowed" by previous decisions, and because it effectively overruled Price v. Southern Pacific

Transportation Co., 586 F2d 750, 753 (9th Cir. 1978), which had applied the longer 3-year California statute of limitations for bringing an action on a statute. Edwards v. Teamsters Local Union No. 36, 719 F2d at 1040. Edwards further found that the second and third criteria weighed against retroactive application, because the reasons behind allowing actions against a union for breach of the duty of fair representation would be disserved by barring a suit by an employee when a longer statute of limitations pertained when the suit was filed, and because "it would. . . produce the most 'substantial inequitable results'. . . to hold the respondent 'slept on his rights' at a time when he could not have known the

time limitation that the law imposed on him." 719 F2d at 1040, quoting Chevron Oil Co. v. Houson, 404 US 97, 108. The Ninth Circuit recognized that a critical factor is whether the new rule is one which might not have been anticipated. Id. at 1041; Singer v. Flying Tiger Line, 652 F2d 1349, 1353 (9th Cir. 1981).

In evaluating whether DelCostello should be given retroactive effect to bar the particular claim involved here, this Court should examine not only its own previous decisions, but also the state of law in the Ninth Circuit at the time this claim was filed, to determine whether DelCostello was clearly foreshadowed and whether it would be unfair to give it retrospective effect. In UAW v.

Hoosier Cardinal Corp., 383 US 696 (1966), this Court established that, in general, "the timeliness of a Section 301 suit. . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." Id. at 704-905. This court continued to adhere to that approach in United Parcel Service v. Mitchell, 451 US 56 (1981). That case held that a suit of this type was governed by a state statute of limitations for vacating an arbitration award, rather than a statute for an action on a contract. Mitchell did not decide, however, the question of whether the action against the union for breach of the duty of fair representation might be governed by a different limitations

period than the action against the employer for wrongful discharge. That question had previously been decided in the affirmative in the Ninth Circuit in Price v. Southern Pacific Transportation Co., 586 F2d 750, 753 (9th Cir. 1978). Price characterized the action against a union as "an action upon liability created by statute," and held that the most analogous state statute of limitations in California was the 3-year limitation for an action upon a liability created by statute.

After the Mitchell decision, the Ninth Circuit was called upon to determine the appropriate statute of limitations for the action against a union in Oregon in McNaughton v. Dillingham Corp., 707 F2d 1042 (9th

Cir. 1983). In that case, the Ninth Circuit noted that Mitchell had not resolved the question as to the appropriate limitations period for an action against a union, but only for the action against the employer. The court went on to hold that, in Oregon, the appropriate statute of limitations for the action against a union is ORS 12.110, which establishes a 2-year period for bringing a professional malpractice action. 707 F2d at 1048-49. The Ninth Circuit did follow Mitchell however, in applying the 20-day arbitration statute of limitations of ORS 33.310 to the action against the employer.

Whatever the situation may have been in other circuits, there can be no doubt that DelCostello constituted

a sharp break with the existing precedent in the Ninth Circuit, especially with regard to the applicable statute of limitations to be applied in this type of action in Oregon. It is equally clear that neither the Ninth Circuit nor Mr. Kuhn could have anticipated the DelCostello decision. Because the equities of retroactive application differ from circuit to circuit depending upon the state of the law in each circuit prior to the time DelCostello was decided, this Court should leave the individual circuits to determine whether the decision should be retroactively applied.

The issue involved in this case is not likely to arise in future cases. The Ninth Circuit's decision in

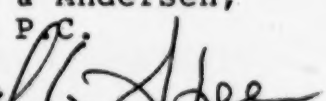
Edwards relied heavily upon the unfairness of applying a shorter statute of limitations than that pertaining when the action was filed. 719 F2d at 1040. Thus, all actions filed after the date of the DelCostello decision, June 8, 1983, would be subject to the 6-month statute of limitations, rendering it unlikely that further cases involving this issue will arise.

CONCLUSION

For the reasons stated in this brief, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Speer, Jones & Andersen,
Lawyers, P.C.

By: 
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